FILE COPY
156
793
Supr. Ct.
FILED
JUL 11 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.

No. 207

PHILADELPHIA RECORD COMPANY,
Petitioner,

against

JOHN O'DONNELL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

JEROME J. ROTHSCHILD,
LEMUEL B. SCHOFIELD,
THOMAS D. McBRIDE,
LAURENCE H. ELDREDGE,
W. BRADLEY WARD,
Solicitors for Petitioner.

1732 Bankers Securities Building,
Philadelphia 7, Pennsylvania.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO PETITION.

	Page
Summary of Matter Involved	1
Statement as to Jurisdiction	13
Questions Presented	18
Reasons Relied on for Allowance of the Writ	19
I. The constitutional question hereby raised has never been decided by this Court and is of such magnitude that a writ of certiorari should be granted	19
II. The action of the Supreme Court of Pennsylvania in affirming a judgment against your petitioner for having exercised its constitutional right under the facts and circumstances above described is clearly reviewable by this court as an infringement of the freedom of the press in violation of the Fourteenth Amendment, for the following reasons	23
1. The due process clause of the Fourteenth Amendment to the Constitution protects freedom of the press	23
2. A judgment of the court of last resort of a state constitutes "state action" within the meaning of the due process clause of the Fourteenth Amendment	24
3. A corporation publishing a newspaper is entitled to freedom of the press under the due process clause	26
4. Freedom of the press, as guaranteed by the Fourteenth Amendment to the Constitution, includes not only freedom from previous restraint upon publication but also freedom from subsequent punishment for publication, except according to law properly applied for abuse of such freedom	31

INDEX TO PETITION (Continued).

Page

III. The action of the state court in permitting a jury to assess damages against petitioner despite O'Donnell's admissions on cross-examination, which established the truth and probable cause of the publication, was contrary to settled rules of the law of Pennsylvania, and the refusal of the Supreme Court of Pennsylvania to reverse the judgment of the lower court and to direct the entry of judgment for the petitioner was arbitrary, capricious and legally unwarranted 36

1. The United States Supreme Court may review the evidence in order to reach its own determination of the facts and to apply the proper common law rules of libel 36

2. O'Donnell's admissions at the trial and the uncontradicted testimony of the petitioner's witnesses, to whose credibility O'Donnell himself testified, established both the truth of the publication and the probable cause for the petitioner's belief in its truthfulness, as well as a complete absence of malice or negligence on the part of petitioner. In such case, the Pennsylvania law of libel requires the court to enter judgment for the publisher 37

O'Donnell's Admissions 37

Weight of Uncontradicted Testimony of Other Witnesses 38

Ruling of Pennsylvania Courts 39

Conclusion 45

LIST OF AUTHORITIES CITED.

Cases.

Page

American Federation of Labor v. Swing, 312 U. S. 321. 24
Black v. Philadelphia Rapid Transit Co., 239 Pa. 463. 41
Bridges v. California, Times-Mirror Co. v. Superior Court of California, 314 U. S. 252, 17, 22, 24, 25, 26, 33, 34, 45
Briggs v. Garrett, 111 Pa. 404 41
Cantwell v. Connecticut, 310 U. S. 296 .....17, 24, 26
Chaplinsky v. New Hampshire, 315 U. S. 568 .....17, 24
Chicago B. & Q. Railroad Co. v. Chicago, 166 U. S. 226 26
Conroy v. Pittsburgh Times, 139 Pa. 334 42
Covington & L. Turnpike Co. v. Sandford, 164 U. S. 578 26
Cox v. Wilkes-Barre Railway Corp., 340 Pa. 554 41
Craig v. Harney, — U. S. —, 91 L. ed. 1141, decided May 19, 1947 .....17, 24, 25, 34, 35, 36
Davidson v. Hartford Life Insurance Co., 151 Mo. App. 561, 132 S. W. 291 25
DeJonge v. Oregon, 299 U. S. 353 .....17, 24
Douglas v. Jeannette, 319 U. S. 157 24
Fiske v. Kansas, 274 U. S. 380 .....17, 36
Gitlow v. New York, 268 U. S. 652 .....17, 24
Grosjean v. American Press Company, Inc., 297 U. S. 233 .....17, 24, 27, 30, 31
Hague v. C. I. O., 307 U. S. 496 .....17, 24, 28
Herndon v. Lowry, 301 U. S. 242 24
Liggett Co. v. Baldridge, 278 U. S. 105 26
Lovell v. City of Griffin, Georgia, 303 U. S. 444 .....17, 24
Malinski v. New York, 324 U. S. 401 25
Miller v. Gault, 345 Pa. 474 43
Mooney v. Holohan, 294 U. S. 103 24
Near v. Minnesota, 283 U. S. 697 .....17, 24, 31, 32
Northwestern National Life Insurance Co. v. Riggs, 203 U. S. 243 .....27, 28

LIST OF AUTHORITIES CITED (Continued).

Cases (Continued).

Page

O'Donnell v. Philadelphia Record Co., 356 Pa. 307 (instant case in Pennsylvania Supreme Court), 12, 16, 39, 42, 44

O'Donnell v. Philadelphia Record Co., 56 Pa. D. & C. Rep. 328 (instant case in trial court) 14, 36, 45

Pennekamp v. Florida, 328 U. S. 331 .. 17, 24, 25, 27, 34, 35, 36

Pierce v. Society of Sisters of Holy Names, 268 U. S. 510 28

Schneider v. Irvington (State of New Jersey), 308 U. S. 147 ..... 17, 24

Sinking Fund Commissioners of Philadelphia v. Philadelphia, 324 Pa. 129 25

Stromberg v. California, 283 U. S. 359 24

Sweeney v. Schenectady Union Publishing Co., 122 F. 2d 288 ..... 17, 34, 35

Sweeney v. Schenectady Union Publishing Co., 314 U. S. 605 ..... 17, 34

Sweeney v. Schenectady Union Publishing Co., 316 U. S. 642 ..... 17, 34

Thomas v. Collins, 323 U. S. 516 25

Thornhill v. Alabama, 310 U. S. 88 ..... 17, 24, 32

Times-Mirror Co. v. Superior Court of California, 314 U. S. 252 ..... 27, 28, 45

Western Turf Assn. v. Greenberg, 204 U. S. 359 ..... 27, 28

Williams v. Kroger Grocery & Baking Co., 337 Pa. 17 . 41, 42

Witkowski v. Lehigh Valley Railroad Co., 338 Pa. 510. 43

LIST OF AUTHORITIES CITED (Continued).

United States Constitution.

	Page
Amendment I	19
Amendment XIV	11, 13, 15, 18, 19, 27, 31, 33

United States Statutes.

U. S. Judicial Code, Section 237 (b) as amended, 28 U. S. C. A., Section 344 (b)	13

Other Authorities.

Cooley on Constitutional Limitations, 8th Edition, Volume 2, pp. 885-886	32, 33
Restatement of the Law of Torts, Sections 613, 618, 619	42

IN THE

Supreme Court of the United States.

No. OCTOBER TERM, 1947.

PHILADELPHIA RECORD COMPANY,
Petitioner,

against

JOHN O'DONNELL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Philadelphia Record Company, defendant below, respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Pennsylvania rendered by a divided court, reported in 356 Pa. 307 (R. 386), which affirmed a judgment of the Court of Common Pleas No. 4 (tried in No. 2) of Philadelphia County in favor of the plaintiff in an action of libel, reported in 56 Pa. D. & C. Rep. 328 (R. 374).

SUMMARY OF MATTER INVOLVED.

In order properly to evaluate the merits of this petition and to comprehend the gravity of the constitutional questions involved, the incidents culminating in this litigation must be reviewed with particular regard to the setting in which they occurred. That setting was the position of the United States as a world power in April, 1941, and the precarious national and international situation which then prevailed.

The war had been going on for 18 months. Hitler occupied all of Western Europe. France was prostrate and

England had withdrawn to her island and was fighting with her back to the wall. The United States Government was adhering to a policy of neutrality. Many persons in the United States advocated all-out aid to Britain and her allies; others urged the doctrine of isolation and non-intervention.

Against that backdrop, the events leading to this suit occurred.

The respondent, John O'Donnell, was a newspaper columnist. He was in charge of the Washington office of the New York Daily News, a newspaper with the largest circulation in the world (R. 59a). His news stories under his own by-line and a column written by him under the heading "Capitol Stuff" appeared regularly in the New York Daily News and the Washington Times Herald, the latter paper having the largest circulation in Washington.

O'Donnell wrote a story which was published in the Washington Times Herald and the New York Daily News on April 17, 1941. This story was featured on the front page of the Washington Times Herald with a streamer headline and with editorial comment in a box at the head of it by the publisher, Eleanor Patterson, directing attention to the importance of the story and citing her alarm at the dangers involved in the President's secretly committing the country to a policy calculated to lead to war without the knowledge of the Congress or the people. The respondent's article, and Mrs. Patterson's comment, were offered in evidence by the respondent (R. 57a, 354a-360a). On the same day the respondent's story was published in the New York Daily News (R. 64a, 65a, 360a-363a).

O'Donnell in his story stated,

> "Charges that battle craft of the U. S. Navy and the Coast Guard are now giving armed escort to munition-laden British merchantmen leaving Atlantic ports for the European battlefront exploded in the Capital last night.

"Detailed information that President Roosevelt himself is permitting the Coast Guard to accompany the ships of foreign belligerents from the harbors of Baltimore, Philadelphia and New York to a point in the Atlantic where they would be picked up by a U. S. Navy 'neutrality patrol' and thence escorted to a rendezvous determined by the British Admiralty, has already been placed in the hands of Senators" (R. 355a).

The Trial Judge, in a side-bar ruling, referred to "the manifestly biased and prejudiced nature of the plaintiff's news article" (R. 132a).

O'Donnell, in his own case, proved that on the morning of April 17, 1941, the President of the United States read the respondent's article and instructed his Press Secretary, Stephen T. Early, to tell the newspaper men at the press conference that morning that the respondent's story was "a deliberate lie" (R. 44a, 45a). The President further observed that the author of the story had very cleverly woven a long-time and historic or traditional policy of the United States Government into a story which was a deliberate lie (R. 48a, 50a). Mr. Early carried out these instructions (R. 45a-52a).

On the morning of April 17, 1941, J. David Stern, publisher of the defendant newspaper, was in Washington and read O'Donnell's story (R. 77a, 78a). He also read in the Washington Post the denial of it by the Secretary of the Navy, Frank Knox, and the latter's declaration that there was "not a syllable of truth" in the statements contained in the respondent's story (R. 78a, 79a, Defendant's Exhibit No. 1, 363a, 364a). The Knox denial was not mentioned in the respondent's article. Mr. Stern then went to the Washington office of the petitioner in the National Press Building, where he read, as it came over the news ticker, the report that the President of the United States had called O'Donnell's story "a deliberate lie" (R. 81a, 82a).

Mr. Stern knew O'Donnell's reputation in the national capitol as being anti-administration and particularly as an admirer of Nazi Germany. He had discussed O'Donnell and his beliefs with several reputable persons in the newspaper field in Washington who had repeated to him conversations which they had had with O'Donnell from time to time in which O'Donnell expressed such views and sympathies. Several of these correspondents testified at the trial. Mr. Stern also knew that a prominent newspaper man had published a book in which he had referred to O'Donnell's anti-Semitism. He had also been informed that another newspaper man of prominence and admitted qualifications had been so disturbed by the respondent's remarks that he had written about O'Donnell and his views in the New York newspaper PM (R. 82a to 106a; Defendant's Exhibit No. 2, 218a, 364a).

Robert S. Allen, Washington correspondent for the Philadelphia Record, was in the petitioner's office at the time. Following a discussion between him and Mr. Stern concerning O'Donnell's news story which the President that morning had branded as "a deliberate lie", and a review of their previous conversations concerning the respondent's beliefs, they collaborated in writing an editorial [1] in order

---

[1] **'A DELIBERATE LIE'**

In the Daily News, of New York, and the Times-Herald, of Washington, appeared yesterday a story that United States warships were secretly convoying supply ships across the Atlantic.

A few hours after the story appeared, the President denounced it as "a deliberate lie."

The story was written by John O'Donnell, head of the Washington Bureau for the New York Daily News and Washington Times-Herald.

John O'Donnell is a Naziphile. He makes no secret of it. On numerous occasions, to all friends and bar-flies within hearing, he has broadcast his sympathy with most of Hitler's aims—such as destruction of the British Empire, suppression of labor unions and liquidation of Jews.

to inform the public of the respondent's views and sympathies, and of his intense feeling against the administra-

---

The Daily News has the largest circulation of any daily newspaper in America—nearly two million net paid. It is run by Joseph M. Patterson, recognized as one of the ablest publishers in America. The Washington Times-Herald is run by his sister, Mrs. Eleanor Patterson. It has the largest circulation of any newspaper in Washington. The two papers share the services of John O'Donnell.

For many years, Mr. Patterson supported the Democratic Administration, but he broke with the President on his present foreign policy and has been a bitter opponent of the Lease-Lend bill and other measures to help the British.

We do not criticize Mr. Patterson for opposing the President's policies. At a time like this, sincere opposition to Administration policy is a healthy element in our body politic.

Also, Mr. Patterson and his sister are free to employ whomever they please to gather and interpret the news.

But when opposition to the Administration resorts to what the President feels necessary to denounce as "a deliberate lie," then it also becomes right and proper that the public know the kind of man who is writing such news. Mr. O'Donnell feels so intensely on this subject that he may believe himself justified in resorting to any means to block the Administration. At any rate, he is not an unbiased reporter.

Mr. Patterson and his sister may feel that since the sympathies of an overwhelming majority of Washington correspondents are for Great Britain it is wise to employ as head of their Washington Bureau a man whose viewpoint is directly the other way.

Perhaps they are right, but at times like these it is just as important for newspaper readers to know the character of Washington correspondents as it is to know the ownership of newspapers, which is required by law.

Applying this requirement to ourselves, we hereby publicly confess that the head of our Washington Bureau, Robert S. Allen, is pro-Administration and for all-out aid to Britain. An experienced newspaperman, we believe Mr. Allen is doing his best to write objectively.

At least, nothing he has written has been denounced by the Nazis as "a deliberate lie."

tion. It was published in the Philadelphia Record of April 18, 1941 (R. 106a to 110a; 248a to 250a; Plaintiff's Exhibit No. 1, 350a-352a).

On July 3, 1941 the respondent instituted this action. It came on for trial in January, 1943 before the Honorable Joseph Sloane of the Court of Common Pleas No. 7 of Philadelphia County, and a jury, and resulted in a verdict for the respondent in the sum of $50,000. The Court of Common Pleas No. 7, sitting *en banc,* unanimously granted the petitioner's motion for a new trial.

The case again came on for trial in January, 1946 before the Honorable James Gay Gordon, Jr., President Judge of the Court of Common Pleas No. 2 of Philadelphia County and a jury.

During the course of the trial and at the conclusion of the argument of petitioner's motion for a nonsuit, the trial judge informed counsel that the only words of the editorial which the court regarded as libelous in themselves were the charge that plaintiff was in sympathy with the liquidation of Jews (R. 132a-133a).

The presentation of petitioner's evidence in support of its plea of privilege was therefore limited in accordance with the ruling of the trial judge.

J. David Stern, the petitioner's president and publisher, testified to the circumstances which led him and Colonel Robert S. Allen, Chief of the Washington Bureau of the Philadelphia Record, to write the editorial. Mr. Stern testified in detail as to his sources of information concerning O'Donnell, and recounted the conversations which he had had with several prominent Washington correspondents before writing the editorial, who related to Mr. Stern discussions which they had had with the respondent, in which the latter made statements which fully support the comments in the editorial.

Colonel Robert S. Allen, co-author of the editorial, related in his testimony conversations which he had had with O'Donnell and with prominent newspaper men who re-

ported to him statements made by O'Donnell which clearly afforded reasonable and probable cause to believe the truth of the statements made concerning the respondent in the editorial (R. 232a-252a).

The defense called four of these correspondents, all prominent and reputable in the newspaper profession, expressly admitted by the respondent to be reliable reporters with whom the respondent had never had trouble and was on friendly terms, and none of whom had any reason to misquote the statements of O'Donnell. These correspondents all testified as to conversations in which pro-Nazi statements were made by the respondent and which they had related either to Mr. Stern or Colonel Allen or to both of them.

However, the evidence which is of controlling significance in the consideration of this petition is found in the testimony of O'Donnell himself who admitted making pro-Nazi and anti-Jewish statements which, when communicated to Colonel Allen and Mr. Stern gave them the right to draw the conclusion that O'Donnell had "sympathy with most of Hitler's aims—such as * * * the liquidation of Jews."

These admissions of the respondent came into the evidence in the following manner.

Colonel Allen testified that he had a conversation with O'Donnell in the bar of the Bellevue-Stratford Hotel in Philadelphia at the time of the Republican convention in 1940. In the course of their conversation O'Donnell made remarks which caused Allen to say to him: "John, you talk like a Nazi. That is the kind of stuff that Goebbels is putting out." The respondent replied: "Well, the Nazi have done a lot of good things in Germany. They cleaned up Germany, wiped out unemployment and they have restored the honor and standing of Germany as a nation in the world" (R. 234a, 235a). Allen then said to O'Donnell: "Then what do you call the atrocities that they perpetrated on the Jews, thousands of old people, women and children who have been killed for no other reason than they were born Jews?" O'Donnell's reply was that "there probably

had been some excesses, but that certain elements needed cleaning up in Germany" (R. 237a, 238a).

When O'Donnell was cross-examined in rebuttal, he admitted that the newspaper correspondents who had testified for the petitioner were respected and reliable reporters and that no ill feeling existed between him and them. He admitted that he had had a lengthy conversation with one of them, Gardner Jackson, which lasted about three or four hours and that they discussed Hitler and the Nazi practices. He admitted that the Jewish question was discussed in the course of the conversation. The witness was then asked: "Speaking of Nazis, did you say they had found it necessary to liquidate the Jews to carry out their announced program? If the program were to be carried out, the Jews along with the other minorities, they would have to be swept aside, and that it had already been announced by the Nazis?" He answered: "That is a fact. That is true." "Q. You said that?" "A. Yes." He was asked: "Did you say to Mr. Jackson that you thought the Germans had done an effective and thorough job at reorganizing the country?" He replied: "They certainly had, and we both agreed on that." "Q. You said it?" "A. Yes" (R. 275a-278a).

He was then asked this question regarding his admitted conversation with another correspondent, Kenneth Crawford. "You did discuss with Mr. Crawford the Nazi treatment of Jews didn't you?" He answered: "Yes." "Q. Did you during that discussion with respect to that subject use the simile as Crawford testified that the Nazis built roads straight to the point and swept anything aside which got in their way?" "A. I think I did." "Q. So Crawford is correct on that?" "A. Yes, he is correct" (R. 281a).

In rebuttal O'Donnell admitted in direct examination that in his conversation at the Bellevue-Stratford with Allen the latter asked with reference to Hitler: "How can you stand for such things as his treatment of minorities, and so forth in Germany?" In response to this question,

O'Donnell first testified that he said that for Hitler to carry out his program it was necessary for him to brush aside the Communists in Germany and that he could not "recall" having said anything about the Jews (R. 268a). Under cross-examination in rebuttal, however, he admitted that in his conversation with Allen the latter said to him, "John you talk like a Nazi" (R. 282a). He further admitted that in that conversation he told Allen that the Nazis had wiped out unemployment and put Germany back on her feet (R. 282a, 283a). When confronted by Allen's testimony that O'Donnell had said in that conversation that the Nazis had done a good thing for Germany, O'Donnell would not deny having said so (R. 283a). O'Donnell further admitted that Allen had said that in Germany, atrocities had been perpetrated upon Jews, old people, men and women who had been robbed and killed for no other reason than that they had been born Jews (R. 283a). O'Donnell was then asked whether he replied, "There probably have been some excesses, but certain elements needed cleaning up in Germany." His answer was that he made that statement, but not in response to Allen's comment upon the atrocities committed upon Jews (R. 283a, 284a). His attention was then directed to his testimony at the previous trial in which he testified that his statement that "certain elements needed cleaning up in Germany" *was* in response to Allen's statement concerning ill-treatment of Jews. He was then asked to say whether his remark was in reply to Allen's reference to the Jews and he answered:

> "A. I will say yes. That is my better recollection then" (R. 284a, 285a).

The trial judge expressly ruled that the respondent's statements made to Colonel Allen were in themselves sufficient to afford reasonable and probable cause for writing the editorial, in the following language (R. 311a):

> "That was a statement made by the plaintiff, Mr. O'Donnell, to Colonel Allen himself, and if you believe

that occurred, Colonel Allen had a right to draw such a conclusion from that statement, and it would make no difference to this case whether or not the defendants had received other information of the same kind from anybody else."

The trial judge also instructed the jury regarding this conversation (R. 312a):

"Therefore, if you believe that that conversation occurred as told to you by Mr. Allen, it being a matter proper for public information and investigation, the defendants were justified in telling the public so in their editorial."

The trial judge, however, submitted to the jury for determination the question whether the conversation between O'Donnell and Colonel Allen had in fact occurred, notwithstanding O'Donnell's admission that it had occurred and his admission that in the course of the conversation he made the statements hereinbefore referred to (R. 303a, 304a, 311a).

There was no proof of special or actual damage to O'Donnell but the court instructed the jury that the charge that O'Donnell was in sympathy with most of Hitler's aims including liquidation of Jews was libelous *per se* and that the jury might impose punitive damages (R. 322a).

Following the verdict of $25,000.00 in favor of the respondent (R. 365a), the petitioner filed motions for a new trial and for judgment *non obstante veredicto* (R. 365a-369a). In support of the latter motion, the petitioner argued before the trial court *en banc* that O'Donnell's admissions eliminated any question of fact from the case and required the trial judge to direct a verdict in favor of the petitioner as a matter of law. Judge Gordon in his opinion dismissing the motion for judgment *non obstante veredicto,* failed to mention or refer to the vital and controlling effect of the respondent's admissions. With respect to the rule for a new trial, the trial court *en banc* entered an order that

if within fifteen days the respondent filed a *remittitur* of all of the verdict in excess of $8,000., the rule would be discharged; otherwise rule absolute (R. 369a). The respondent filed a *remittitur* of all of the verdict in excess of $8,000 and judgment was entered on the verdict as reduced (R. 370a-371a).

Thereafter petitioner appealed to the Supreme Court of Pennsylvania, assigning as error, *inter alia,* the refusal of the trial court to enter judgment *non obstante veredicto* in favor of the petitioner, complaining that the action of the court in entering judgment against the petitioner constituted a violation of the petitioner's constitutional rights under the Fourteenth Amendment to the Constitution of the United States by depriving it of property without due process of law in that it abridged its right of freedom of speech and freedom of the press (R. 384).

The Supreme Court of Pennsylvania, acting by a bare majority of four members, affirmed the judgment (R. 386-391). The remaining three Justices dissented upon the ground that the respondent's own admissions barred his right to recover as a matter of law (R. 392-418).

It is the petitioner's contention that the admissions of the respondent showed as a matter of law that the petitioner acted upon probable cause, and, that issue of fact having been effectually eliminated from the case by the respondent's admissions, the failure of the trial judge to direct a verdict for the petitioner should have been corrected by the trial court *en banc* or by the Supreme Court of Pennsylvania by the entry of judgment *non obstante veredicto* in favor of petitioner.

The trial court, in its opinion dismissing the motion for judgment *non obstante veredicto,* did not even refer to the petitioner's argument that the respondent was bound by his admissions which, as the trial judge instructed the jury, were in themselves sufficient to afford reasonable and probable cause for writing the editorial.

The majority of the Supreme Court of Pennsylvania answered this contention by stating: "We must reject that

contention because it contradicts the verdict. It was the duty of the jury to find what the witnesses said and what they meant and whether the defense of privilege was made out" (R. 387). Of course the petitioner's contention contradicts the verdict. Every motion for judgment *non obstante veredicto* contradicts the verdict; that is precisely the purpose of the motion. The proposition that the credibility of oral testimony is for the jury is not applicable where the plaintiff gives oral testimony admitting a fact which if proved by the defendant would constitute a complete defense. The respondent in this case cannot contend that his credibility was for the jury and that the jury was free to disbelieve the testimony which the respondent swore was true and by which he was bound. If the respondent stated something he did not mean, he cannot be heard to complain that his auditor took him at his word. Therefore, once the respondent admitted what he said, it became a pure question of law for the court to decide whether what he said constituted probable cause for what the petitioner said of him.

Mr. Chief Justice Maxey in his dissenting opinion expressed the petitioner's position in this respect in the following words:

> "I ask under what theory of administering justice a jury can be permitted to make a finding of fact in favor of a plaintiff, *which finding is contrary to what the plaintiff himself testified under oath?* . . . When a jury, by its verdict finds that there was no reasonable and probable cause for characterizing such a pro-Nazi as O'Donnell by his testimony *admitted himself to be,* as 'being in sympathy with Hitler's liquidation of Jews', *the contradiction* between the *verdict in favor of the plaintiff* and the *plaintiff's own testimony* is so *unmistakable* that no court can, in justice, permit it to stand, and the judgment based upon it should be set aside." (Italics not supplied.) (356 Pa. 307, at 343-344, R. 414-415.)

The refusal of the Supreme Court of Pennsylvania to set it aside violated the petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (b), as amended, of the Judicial Code (28 U. S. C. A., Section 344 (b)). It is respectfully urged that, in accordance with United States Supreme Court Rule No. 38, Paragraph 5 (a), the Supreme Court of the United States exercise its sound judicial discretion and grant a review on writ of *certiorari* because the Supreme Court of Pennsylvania, by its arbitrary and legally unwarranted action, has imposed a punitive sanction (by way of a judgment for damages) on the exercise by your petitioner of its right to freedom of the press, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States.[2] The action of the state court should be reviewed for the additional and supplementary reason that the federal question raised by the special facts and circumstances of this case has never been determined by the Supreme Court of the United States.

The grounds of this petition are substantial because if the judgment entered against the petitioner is allowed to stand, it will constitute a precedent that will tend to deter newspapers from exercising their constitutional right of freedom of the press on matters of grave national im-

---

[2] "Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

portance and at times when it is most necessary that they do so.

The constitutional question was dismissed by the trial court as follows:

> "The trial of a case of this kind, involving, as it does, one of our fundamental liberties, demands that special respect be accorded to the judgment of a jury of average persons in determining its abuse. There is no room in such a case for a strict application of technical legal rules; and after two juries have passed upon the subject their judgment should prevail." 56 Pa. D. & C. Rep. 328, at 336-337 (R. 380).

In other words the trial judge held that the jury, not the court, should determine questions of constitutional law even on admitted facts.

The constitutional question as to whether the trial court's action was in violation of the Fourteenth Amendment was brought to the attention of the Supreme Court of Pennsylvania by the petitioner as appellant, by assignment of error number seven (supplemental assignment) (R. 384), which specifically complained of a violation of your petitioner's constitutional rights under the Fourteenth Amendment to the Constitution of the United States. The constitutional question was also presented to the Supreme Court of Pennsylvania in petitioner's brief as appellant in that court, at pages 55-57. The majority opinion of the Supreme Court of Pennsylvania dismissed the seventh assignment of error (supplemental assignment), saying, "Defendant's brief contains nothing which, so far as we can understand it, supports the assignment," 356 Pa. 307, at 314 (R. 389), and affirmed the plaintiff's judgment in the sum of $8,000 on March 29, 1947 (R. 391). Reargument was refused April 14, 1947 (R. 428). Chief Justice Maxey and the two justices who agreed with his dissent clearly indicated that the action of the Supreme Court of Pennsylvania, by a 4 to 3 majority, violated the due process clause

of the Fourteenth Amendment to the Constitution of the United States.

The Chief Justice said:

"It is an axiom that a free press is essential to the permanence of a government of constitutionally guaranteed freedom. In 1941, the independence of this nation and the freedom of the American people were threatened by Hitler and his murder bund. It was the duty of the American press to expose anyone who approved Hitler's purposes or condoned his practices. The seventh section of the Bill of Rights in our State Constitution declares: 'The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.' The First Article of the Bill of Rights of the Federal Constitution lists freedom of expression with freedom of religion, assembly and of petition and forbids Congress to enact any laws prohibiting any of these fundamentals of free government. Freedom of speech and of the press are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States: *Near v. Minnesota,* 268 U. S. 703; *Gitlow v. New York,* 268 U. S. 652; *Schneider v. State,* 308 U. S. 147.

"Individuals are also entitled to have their reputations protected. The first section of the Bill of Rights in our State Constitution declares: 'All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.' The common law also protected the individual in the security of his good reputation. See Blackstone's Commentaries, Book 1, page 134.

> "When the plaintiff by his public utterances revealed that instead of having his moral indignation aroused by the Nazi murders and robberies of Jews in Germany he approved or at least extenuated, those hideous crimes, he to that wide extent had no reputation entitled to the law's protection, and the defendant rendered a praiseworthy public service in informing its readers as to what inhuman and uncivilized practices this man blatantly and shamelessly sanctioned." 356 Pa. 307, 339-340 (R. 411-412).

There can be no question that the undisputed facts, especially the testimony of the plaintiff himself, established the truth of the defendant's publication. There cannot be even a shadow of doubt that the plaintiff's own testimony proved that the defendant had reasonable and probable cause to believe that its publication was true and important for public information in a time of national peril. It will be shown that under the law of Pennsylvania, as it existed both at the time of the adoption of the Fourteenth Amendment and ever since, it was incumbent upon the court to direct a verdict for the defendant and that its failure to do so resulted in penalizing the defendant newspaper for having exercised its constitutional privilege. This petition for a writ of *certiorari* is therefore not based merely upon the ground that the Supreme Court of Pennsylvania erred in applying the law of that state, but upon the fundamental proposition that no state court by an arbitrary, legally unwarranted and erroneous ruling can violate the United States Constitution and that while the United States Supreme Court may not choose to exercise its discretion to review when the violation affects only the property rights of a private citizen, it will not hesitate to do so when the issue is one of grave national importance and affects the safety of the nation.

The jurisdiction of the United States Supreme Court to issue a writ of *certiorari* in this case is sustained by similar action of this court where a petitioner has alleged

that an erroneous, capricious or arbitrary application of the law by a state court restricts the petitioner's freedom of the press in violation of the Fourteenth Amendment to the United States Constitution.

Bridges v. California, 314 U. S. 252 (1941);
Pennekamp v. Florida, 328 U. S. 331 (1946);
Craig v. Harney, — U. S. —, 91 L. ed. 1141, decided May 19, 1947.

The foregoing cases were "contempt cases." However, this court granted a writ of *certiorari* to the Second Circuit Court of Appeals in a libel case in which the constitutional questions raised by the pleadings and the rulings thereon were substantially identical with those in the instant case. *Sweeney v. Schenectady Union Publishing Co.*, 122 F. 2d 288 (C. C. A. 2d, 1941), *certiorari* granted 314 U. S. 605, affirmed by an equally divided court, 316 U. S. 642.

This court on more numerous occasions has undertaken to review state legislative action as well as judicial action which has infringed the constitutional right to free press:

Gitlow v. New York, 268 U. S. 652 (1925);
Near v. Minnesota, 283 U. S. 697 (1931);
Grosjean v. American Press Company, Inc., 297 U. S. 233 (1936);
Schneider v. Irvington, 308 U. S. 147 (1939);

and the constitutional right to free speech:

Fiske v. Kansas, 274 U. S. 380 (1927);
DeJonge v. Oregon, 299 U. S. 353 (1937);
Lovell v. City of Griffin, Georgia, 303 U. S. 444 (1938);
Hague v. C. I. O., 307 U. S. 496 (1939);
Thornhill v. Alabama, 310 U. S. 88 (1940);
Cantwell v. Connecticut, 310 U. S. 296 (1940);
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).

QUESTIONS PRESENTED.

(1) When a widely published statement by a prominent newspaper columnist and reporter on a matter of grave national importance has been characterized by the President of the United States as "a deliberate lie", and a newspaper in an editorial published the next day informs its readers of the self-declared sympathy of the columnist so characterized, with "most of Hitler's aims such as liquidation of Jews" and at a trial of a libel action begun by the columnist he makes such admissions on cross-examination that no reasonable man in the light of them could possibly regard the editorial as untrue or as having been written without reasonable and probable cause; and under the law existing both at the time the Fourteenth Amendment was adopted and ever since, it was the duty of the state court under all the evidence to direct a verdict for the defendant publisher, was not the action of the state court in arbitrarily, capriciously and erroneously refusing to direct such a verdict and in affirming a money judgment imposing a punitive sanction for the publication, a violation of the newspaper's constitutional rights to freedom of the press which this court should review and correct?

(2) Is the incorporated publisher of a newspaper entitled to the freedom of the press guaranteed under the due process clause of the Fourteenth Amendment?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The Constitutional Question Hereby Raised [3] Has Never Been Decided by This Court and Is of Such Magnitude That a Writ of Certiorari Should be Granted.

That the First Amendment [4] is mirrored within the Fourteenth Amendment to the United States Constitution and protects against the state's abridgment of the rights of freedom of speech and of the press is accepted today without challenge in accordance with a long line of decisions of this Court. (See the cases cited above under the "Statement As To Jurisdiction", p. 17.) There is, however, a borderline, not yet clearly charted by this Court, between the right to recover damages in a libel action and the right of a newspaper at a time of crisis to inform its readers upon matters of national import affecting the security of the nation and to do so free from the imposition of a punitive sanction (in the form of a judgment for damages) by the arbitrary and legally unwarranted action of a state court.

If this court has not heretofore exercised its judicial discretion to take jurisdiction of a case involving freedom of the press in which a jury's verdict in a libel action has been sustained by the highest appellate court of the state in which the action was begun, the reason is probably that most libel actions raise only questions of narrow import and affect not the public welfare but only private rights. Were this court to review every case in which it is alleged that without due process of law a defendant has been deprived

---

[3] The constitutional question raised by this petition is set forth immediately preceding, under "Questions Presented".

[4] "Amendment 1: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

of property or liberty or in which he suffers a money judgment because of an alleged libel committed by him, it would indeed be harassed with a multitude of questions with which the United States Supreme Court should not be burdened and with respect to which the decisions of the state court of last appeal should be accepted as final.

Where, however, in a rare instance such as this, a punitive sanction, by way of a money judgment, is unjustly imposed by a state court upon the courageous performance by the press of a public duty in a time of national crisis when the peril of a premature declaration of war threatens the nation, it is submitted that there can be no doubt of the right and power of this court to assume jurisdiction.

It will hereinafter be shown that the judgment of the Supreme Court of Pennsylvania affirming the judgment of the trial court constitutes "State action" within the meaning of the due process clause of the Fourteenth Amendment; that a corporation *organized to publish a newspaper* is entitled to the freedom of the press guaranteed under the Due Process Clause of the Fourteenth Amendment; and that the freedom of the press guaranteed by the Constitution consists not only of freedom from previous restraint upon publication but also a freedom from subsequent punishment for publication except according to common law rules properly applied for abuse of such freedom. It will also be shown that this court not only may review the action of a state court in punishing a publisher for contempt where the publisher has properly exercised the right of freedom of the press, but that it may also review state court action in imposing punishment upon a publisher in the form of a judgment in a libel action if the judgment was erroneously and improperly imposed in violation of the Constitutional privilege.

Finally, it will hereinafter appear that the refusal of the trial court to enter judgment for the petitioner notwithstanding the verdict and the action of the Supreme Court of Pennsylvania in affirming judgment on the verdict and

refusing to direct the entry of judgment for your petitioner, was not *due process of law* but gross error in disregard of the petitioner's constitutional rights.

Since this court is asked to take jurisdiction on the ground that this was not an ordinary libel case but one in which the exercise by the petitioner of its right to freedom of the press, at the time and in the way in which it was exercised, was highly necessary in the public interest, it will be relevant to set forth the background of the case.

On April 17, 1941, the European world was embroiled in the wars of Hitler's aggression. Great Britain was exhibiting a heroic defense against the Nazi war machine and was waiting for aid from this country. The United States was endeavoring to maintain its neutrality. Probably the most important single public issue in the nation on that day was whether we should continue to be neutral or immediately enter the war on the side of the Allies. A premature declaration of war either by this country or by Germany might have had disastrous consequences. Nevertheless on that day John O'Donnell, writing under a by-line for the New York Daily News and Washington Times Herald, stated that United States warships already were secretly convoying British supply ships in the Atlantic. President Roosevelt promptly denounced the O'Donnell story as a "deliberate lie".

Your petitioner, the Philadelphia Record Company, publishing a newspaper of general and wide circulation, undertook by way of an editorial written jointly by J. David Stern and Colonel Robert S. Allen to give the public information regarding O'Donnell's sympathies and thereby a better understanding and perspective of his propagandist writings. To do so it was necessary to make a fair and dispassionate statement of O'Donnell's apparently well-known leanings and sympathies. A reading of the complete editorial (*supra,* pp. 4-5n) will reveal that its approach is both fair and dispassionate. It aptly said: ". . . at times like these it is just as important for news-

paper readers to know the character of Washington correspondents as it is to know the ownership of newspapers which is required by law". At the trial of the libel action begun by O'Donnell he admitted that he told Colonel Allen, one of the authors of the editorial in question, that the Nazis had wiped out unemployment and had put Germany back on her feet. He admitted on cross-examination that in a discussion of the Nazi liquidation of the Jews he had said that there probably had been some excesses but certain elements needed cleaning up in Germany. Further he would not deny that he had said that the Nazis had done a good thing for Germany.

Despite O'Donnell's admissions and the strong corroborative and uncontradicted testimony of other witnesses to whose credibility O'Donnell himself had testified, the Court refused to direct a verdict for the defendant and left it to the jury to say whether the joint authors of the editorial, to one of whom O'Donnell admittedly made the above statements, had reasonable and probable cause for saying that O'Donnell had sympathy with most of Hitler's aims including the liquidation of Jews. *In other words, what the Court said in effect was that it was proper to leave to the jury whether O'Donnell, the plaintiff, told Colonel Allen, one of the authors of the editorial, what on cross-examination he admitted having told him!*

It may be said that O'Donnell did not *in haec verba* admit that he sympathized with the "liquidation of Jews." It could hardly be expected that he would say on cross-examination in so many words, "Everything you said about me was true but I want damages anyhow". His admissions however clearly say so in effect, and establish beyond peradventure of doubt that the petitioner printed the truth and certainly what the plaintiff himself had given the petitioner reasonable cause to believe to be the truth regarding his Nazi sympathies.

As Justice Black stated in *Bridges v. California,* 314 U. S. 252 (1941) in a bit of masterful understatement at

page 269, "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the idea seeking expression." If there ever was need for free comment in the daily newspapers that need existed on April 18, 1941 when the petitioner's editorial was published. *If ever there was an important duty for the press to perform it was the exposing on that day of all known Nazi propagandists.*

The laws of this country in accordance with our democratic principles permit wide freedom of expression by the press. Ideologies of all kinds, if not openly subversive of our form of government, are allowed free expression. Even the publication of highly offensive group libels cannot be punished under our law. It is therefore earnestly submitted that this court should not fail to extend the Constitutional protection to a newspaper which in a time of national crisis has in good faith and upon reasonable and probable cause exposed the Nazi sympathies of a well known columnist endeavoring to influence public opinion on matters affecting war and peace and the safety of the nation at the time and under the circumstances above described.

II. The Action of the Supreme Court of Pennsylvania in Affirming a Judgment Against Your Petitioner for Having Exercised Its Constitutional Right Under the Facts and Circumstances Above Described Is Clearly Reviewable by This Court as an Infringement of the Freedom of the Press in Violation of the Fourteenth Amendment for the Following Reasons.

---

1. The Due Process Clause of the Fourteenth Amendment to the Constitution protects freedom of the press.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides "nor shall any state deprive any person of life, liberty or

property without due process of law", protects and guarantees freedom of the press.[5]

Gitlow v. New York, 268 U. S. 652 (1925);
Near v. Minnesota, 283 U. S. 697 (1931);
Grosjean v. American Press Company, Inc., 297 U. S. 233 (1936);
Schneider v. State, 308 U. S. 147 (1939);
Bridges v. California, 314 U. S. 252 (1941);
Douglas v. Jeannette, 319 U. S. 157 (1943);
Pennekamp v. Florida, 328 U. S. 331 (1946);
Craig v. Harney, U. S. , 91 L. Ed. 1141, decided May 19, 1947.

As was said in *Near v. Minnesota,* 283 U. S. 697, at 707:

> "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

2. A judgment of the court of last resort of a state constitutes "state action" within the meaning of the Due Process Clause of the Fourteenth Amendment.

The judgment of the Supreme Court of Pennsylvania, affirming the judgment of the trial court, constitutes "state action" within the meaning of the due process clause of the Fourteenth Amendment.

See

Mooney v. Holohan, 294 U. S. 103, 113 (1935);
A. F. of L. v. Swing, 312 U. S. 321 (1941);

---

[5] For similar rule with respect to the freedoms of speech and religion, see *Stromberg v. California,* 283 U. S. 359 (1931); *DeJonge v. Oregon,* 299 U. S. 353 (1937); *Herndon v. Lowry,* 301 U. S. 242 (1937); *Lovell v. Griffin,* 303 U. S. 445 (1938); *Hague v. C. I. O.,* 307 U. S. 496 (1939); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *A. F. of L. v. Swing,* 312 U. S. 321 (1941); *Chaplinsky v. New Hampshire,* 315 U. S. 568 (1942).

Bridges v. California, 314 U. S. 252 (1941);
Thomas v. Collins, 323 U. S. 516 (1945);
Malinski v. New York, 324 U. S. 401 (1945);
Pennekamp v. Florida, 328 U. S. 331 (1946);
Craig et al. v. Harney, U. S. , 91 L. Ed. 1141 (decided May 19, 1947);
Davidson v. Hartford Life Insurance Co., 151 Mo. App. 561, 132 S. W. 291 (1910);
Sinking Fund Commissioners of Philadelphia v. Philadelphia, 324 Pa. 129 (1936).

Under the above authorities, when a state court, by its judgment, erroneously, arbitrarily or capriciously decides in favor of a plaintiff, the defendant has suffered deprivation at the hands of "the state" just as surely as if the state legislature had resolved to confiscate his property.

In *Bridges v. California,* 314 U. S. 252, Justice Black said, at pages 260-261:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in Cantwell v. Connecticut, 310 U. S. 296, 307, 308, 84 L. ed. 1213, 1219, 1220, 60 S. Ct. 900, 128 A. L. R. 1352, such a 'declaration of the state's policy would weigh heavily in any challenge of the law as infringing constitutional limitations'. But as we also said there, the problem is different where the 'judgment is based on a common law concept of the most general and undefined nature'. Id. 308. Cf. Herndon v. Lowry, 301 U. S. 242, 261-264, 81 L. ed. 1066, 1076-1078, 57 S. Ct. 732. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such

circumstances, this Court has said that 'it must necessarily be found, as an original question' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive (them) of the constitutional protection'. Gitlow v. New York, 268 U. S. 652, 671, 69 L. ed. 1138, 1148, 45 S. Ct. 625."

Although Justice Black's language was used in a contempt case, in which "the substantive evil" was the disruption of the fair administration of justice and the constitutional protection was the freedom of the press, his language is equally applicable to this case, in which the constitutional protection is likewise freedom of the press and the substantive evil is merely the alleged injury to the personal reputation of the plaintiff.

In accordance with the policy of this court, as enunciated in *Bridges v. California* and in *Cantwell v. Connecticut*, it is necessary for this Court to analyze the action taken by the state court at least as critically as it would analyze an act of a state legislature in order to determine whether state action in either case has abridged the petitioner's constitutional rights.

3. A corporation publishing a newspaper is entitled to freedom of the press under the due process clause.

A corporation is unquestionably entitled to the protection of its *property* against deprivation without due process under the Fourteenth Amendment.

Covington & L. Turnpike Co. v. Sandford, 164 U. S. 578 (1896);
Chicago B. & Q. Railroad Co. v. Chicago, 166 U. S. 226 (1897);
Liggett Co. v. Baldridge, 278 U. S. 105 (1928).

Whether or not corporations are entitled to *all* the liberties guaranteed to "persons" under the due process clause, a corporation *organized to publish a newspaper* is

clearly entitled to the freedom of the press guaranteed thereunder.

The right of a corporation to enjoy freedom of the press was squarely raised and upheld in *Grosjean v. American Press Company, Inc.*, 297 U. S. 233 (1936). At page 244, Justice Sutherland, speaking for a unanimous court, said:

> "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 592, 41 L. ed. 560, 565, 17 S. Ct. 198; Smyth v. Ames, 169 U. S. 466, 522, 42 L. ed. 819, 840, 18 S. Ct. 418."

In *Times-Mirror Company v. Superior Court of California*, 314 U. S. 252 (1941) and in *Pennekamp v. Florida*, 328 U. S. 331 (1946), the United States Supreme Court reversed convictions of corporate publishers for contempt of court because the actions of the state courts had impaired the corporations' right to freedom of the press under the Fourteenth Amendment.[6]

---

[6] It is true that in *Northwestern National Life Insurance Company v. Riggs*, 203 U. S. 243 (1906), there is language to the effect that the "liberty" referred to in the Fourteenth Amendment "is the liberty of natural, not artificial, persons". This was clearly *obiter dictum* because the holding was that a foreign insurance company was not deprived of its "liberty" or "property" without due process of law by a Missouri statute which cut off defenses for fraudulent misrepresentation in suits on life insurance policies.

Similar language was used by way of *dictum* in *Western Turf Assn. v. Greenberg*, 204 U. S. 359 (1907), in which a corporation operating a racetrack was held not to have been

If there is any doubt concerning the right of a corporation to claim freedom of the press under the Fourteenth Amendment, it is important that the court should take this occasion to dispel such doubt. The great majority of the

---

deprived of "liberty" or "property" by a California statute requiring a place of public amusement to honor its own tickets in the hands of any person except in enumerated circumstances. Here, too, the state statute was upheld.

Similar language was again used in *Pierce v. Society of Sisters of Holy Names,* 268 U. S. 510 (1925), in which it was held that corporations operating private schools were entitled to enjoin the enforcement of a compulsory public school statute as a deprivation of property, although it was said that they could not complain of the statute as a deprivation of the corporation's "liberty".

Although the three cases last mentioned speak of "liberty" as not pertaining to corporations, the statements are merely, *dicta,* and *freedom of the press was not involved in any of the three cases.*

In Justice Stone's concurring opinion in *Hague v. C. I. O.,* 307 U. S. 496 (1939), he likewise said that corporations were not entitled to the protection of "liberty" under the Fourteenth Amendment and, for that principle, he cited *Northwestern National Life Insurance Company* and *Western Turf Association* cases. However, Justice Stone was not attempting in his concurring opinion to deny to a newspaper publishing corporation its freedom of the press; he was merely explaining why he thought that American Civil Liberties Union, a corporation, was not entitled to bring a suit to enjoin the enforcement of the Jersey City Ordinance on the same basis as the individual petitioners suing under the Civil Rights Act to protect their freedom of speech and of assembly.

The dissenting opinion in *Times-Mirror Company v. Superior Court of California,* 314 U. S. 252 (1941) similarly contains the expression that corporations cannot claim for themselves the "liberty" which the due process clause guarantees. For this proposition, the *Hague* and the *Pierce* cases were cited. The majority of the court obviously took the contrary view and held that the Times-Mirror Company, a corporation, was entitled to freedom of the press under the due process clause and could not be adjudged in con-

newspapers in the United States and nearly all those with large circulations are owned and published by corporations. If this court should commit itself to the principle that a corporation is not under any circumstances, even the extraordinary ones of the instant case, entitled to freedom of the press, only the comparatively few newspapers of limited circulation and influence which are published by individual persons or partnerships would have constitutional protection. The result would be that any individual, even if of disreputable or doubtful character, could claim that protection by barely avoiding abuses of the privilege, but none of the newspapers of the country published by corporations which is the case with the vast majority of the leading journals of the country, could invoke the constitutional right of a free press even though its federal rights were flagrantly violated by state action.

Furthermore, when a corporation organized for the purpose of publishing a newspaper is denied freedom of the press it suffers not only a deprivation of "liberty" but also a deprivation of property without due process. The property loss the petitioner has sustained in the instant case is not only the $8,000 which, according to the verdict of the state court, it must pay as a penalty for exercising its constitutional prerogative and informing the public of a propagandist's pro-Nazi sympathies at a time of national crisis. It has sustained a much greater loss in the serious

---

tempt of court for having exercised that right. The dissenting opinion was primarily based upon the ground that the newspaper was guilty of contempt in an attempt to overawe a judge in a matter immediately pending before him, thus interfering with the administration of justice. The statement in the dissenting opinion that corporations cannot claim for themselves the "liberty" which the Due Process Clause guarantees, was not necessary to the dissent and was manifestly only mentioned as a supplemental and additional reason why the minority of the court would not have disturbed the contempt conviction of the Times-Mirror Company.

impairment of its corporate franchise by the handicap thus placed upon its editorial freedom.

The issue here presented transcends in importance the private rights of your petitioner and respondent in this particular matter. This Court alone has the power, by its action in this case, to preserve from a serious inroad the freedom of the press which should be enjoyed by all legitimate publications whether owned and published by corporations or by individuals, not primarily for the sake of the owners but for the sake of the national welfare and the safety of our democratic form of government.

Justice Sutherland expressed this very clearly in the *Grosjean* case, 297 U. S. 233, at page 250:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

It is unnecessary to present hypothetical cases as examples of this transcendental purpose of the constitutional protection given to freedom of the press because no stronger case could be imagined than the case at bar. In a time of national crisis, when well known and popular by-line writers in the daily press had so much influence in the molding of public opinion, one of them (O'Donnell, the plaintiff) indulged in such reckless and prejudiced tirades against the administration that the President of the United States saw fit to term his widely published report about the convoying of ships a "deliberate lie". At such a time it was certainly

the right of the petitioner to inform the public of O'Donnell's *self-declared* prejudices and sympathies so that it might correctly evaluate and appraise his further criticisms of national policy. It should not be denied that privilege or penalized for its exercise merely because it is the enterprise not of one or a few individuals but of a number of them associated in corporate organization.

4. Freedom of the press as guaranteed by the Fourteenth Amendment to the Constitution includes not only freedom from previous restraint upon publication but also freedom from subsequent punishment for publication except according to law properly applied, for abuse of such freedom.

Freedom of the press, as guaranteed by the Fourteenth Amendment to the United States Constitution, consists not only of freedom from previous restraint upon publication, *Near v. Minnesota,* 283 U. S. 697 (1931), and of freedom from the fetter of special taxation, *Grosjean v. American Press Company, Inc.*, 297 U. S. 233 (1936), but also of freedom from subsequent punishment for publication, except according to the common law rules for abuse of the freedom.

In *Near v. Minnesota,* 283 U. S. 697 (1931), at page 715, Chief Justice Hughes, speaking for the majority of the court, said:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. 2 Cooley, Const. Lim. 8th ed., pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the

proper discharge of judicial functions. *Patterson v. Colorado,* 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556, 10 Ann. Cas. 689; *Toledo Newspaper Co. v. United States,* 247 U. S. 402, 419, 62 L. ed. 1186, 1193, 38 S. Ct. 560. In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws."[7]

---

[7] Particular attention is called to the sentence in which this court said, "In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment." So saying the Court left open for later decision a case such as the one at bar, which presents the opportunity for deciding whether the *state* has *appropriately afforded private redress by its libel laws* or the petitioner's right to a free press has been unconstitutionally abridged by a state court's arbitrary and unwarranted action in flagrant disregard of the state law, whether the law of libel or otherwise.

In *Thornhill v. Alabama,* 310 U. S. 88 (1940), at pages 101-102, this court again said:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

In *Near v. Minnesota,* 283 U. S. 697 (1931), this court repudiated the doctrine of Blackstone that freedom of the press meant freedom from previous restraints upon publication. It approved the criticism of Blackstone advanced by Judge Cooley in Volume 2 of his Constitutional Limitations, 8th Edition, where he said, at page 885:

> ". . . the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the pub-

The question raised by this petition therefore is whether the publisher's right of freedom of the press has been infringed by suffering punishment at the hands of a state court in a civil libel action which should have been dismissed, according to the common law rules of libel which were in force in Pennsylvania in 1868, when the Fourteenth Amendment was adopted, and which are still in force.

There are two ways by which publishers, abusing the freedom of the press, may subsequently be visited with punishment. The first is by a proceeding for contempt of court; the second is by civil or criminal action for libel. On numerous occasions this court has reviewed the action of a state court in punishing a publisher for contempt where the publisher has alleged that the state's misapplication of the "clear and present danger" rule has had the effect of impairing his freedom of the press.

Bridges v. California, Times-Mirror Company v. Superior Court of California, 314 U. S. 252 (1941);

---

lic authorities might nevertheless punish him for harmless publications."

At page 886, Judge Cooley further stated:

"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guarantees were established, and in reference to which they have been adopted."

Pennekamp v. Florida, 328 U. S. 331 (1946);
Craig v. Harney, — U. S. —, 91 L. ed. 1141, decided May 19, 1947.

In the contempt cases the "clear and present danger" rule has evolved over a period of time as a result of counterbalancing two weighty considerations. On one hand, the courts must have the power to protect themselves against expressions which interfere with the fair administration of justice. On the other, the courts must protect the freedom of speech which is guaranteed to the publisher of the allegedly contemptuous statement. As Justice Black expressed it in *Bridges v. California, Times-Mirror Company v. Superior Court of California,* 314 U. S. 252 (1941), at page 260, "For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

In libel cases the court has a similar duty to protect the alleged libeler's right to freedom of the press, but the counterbalancing consideration, namely, the right to damages of the individual claiming to have been defamed, is not nearly so important as the fair administration of justice. As such right to damages must be considered a limitation upon the constitutional right to a free press, it must be acknowledged that, *to the extent liability for libel is unwarrantedly and illegally increased, the freedom of the press is correspondingly abridged.*

Only one instance has come to our attention in which this Court has been requested to review a libel action on the ground that an erroneous, capricious or arbitrary application of the state law of libel has resulted in an infringement of a publisher's right to a free press. In *Sweeney v. Schenectady Union Publishing Co.,* 122 F. 2d 288 (C. C. A. 2d, 1941), a petition for *certiorari* was granted (314 U. S. 605). The opinions of the justices in the *Sweeney* case were equally divided and the case was affirmed without opinion (316 U. S. 642). The case at bar is amazingly similar to the *Sweeney* case in most respects. A corporate

newspaper was sued in each case for having described Sweeney as anti-Jewish and O'Donnell as a Naziphile.

There are two substantial differences between the *Sweeney* case and the case at bar. In the first place, the court to which the *certiorari* was directed in the *Sweeney* case was the Second Circuit Court of Appeals, whereas in this case it would be the Supreme Court of Pennsylvania. In this case, therefore, the action complained of below is more clearly "state action" than it was in the *Sweeney* case. In the second place, the *Sweeney* case came up for review on the sufficiency of the pleadings, whereas your petitioner here is seeking a review of a final judgment. It is, therefore, your petitioner's last chance to invoke its constitutional safeguard. The fact that this Court in the *Sweeney* case took jurisdiction of the question whether the action of an inferior court in a libel case violated the constitutional guaranty of freedom of the press is persuasive that its discretion to exercise such jurisdiction can be asserted in the instant case.

The subsequent punishment which may effectively abridge the freedom of the press may take several forms. There may be imprisonment (*Craig v. Harney,* — U. S. —, 91 L. ed. 1141, decided May 19, 1947) or fine (*Pennekamp v. Florida,* 328 U. S. 331 (1946)) or punitive damages. In the case at bar the punishment has taken the form of punitive damages. It is respectfully urged that no distinction should be made between criminal and civil cases because the form of the punishment is never dictated by the person claiming freedom of the press. The only factor to be considered in any case is whether the punishment will have the effect of bridling publishers, who will fear to publish newsworthy articles for the information of the public because they might be imprisoned or fined or be called upon to pay punitive damages. Subsequent punishment, illegally administered by a state court without warrant or sanction of law, for a publication concerning an extremely vital pub-

lic issue by imposition of an improper judgment for punitive damages in a civil libel action is a deprivation of liberty without due process of law and, as such, merits review in this court.

III. The Action of the State Court in Permitting a Jury to Assess Damages Against the Petitioner Despite O'Donnell's Admissions on Cross-Examination, Which Established the Truth and Probable Cause of the Publication, Was Contrary to Settled Rules of the Law of Pennsylvania; and the Refusal of the Supreme Court of Pennsylvania to Reverse the Judgment of the Lower Court and to Direct the Entry of Judgment for the Petitioner, Was Arbitrary, Capricious and Legally Unwarranted.

---

1. The United States Supreme Court may review the evidence in order to reach its own determination of the facts and to apply the proper common law rules of libel.

The United States Supreme Court may review the evidence in order to reach its own determination of the facts and to apply the proper common law rules of libel.

> *Fiske v. Kansas,* 274 U. S. 380 (1927);
> *Pennekamp v. Florida,* 328 U. S. 331 (1946);
> *Craig, et al., v. Harney,* — U. S. —, 91 L. Ed. 1141, decided May 19, 1947.

The attention of this Court is called to the observation of the trial judge, who "was impressed by plaintiff's obvious quibbling, evasions, and his manifest want of sincerity and veracity, and was utterly unable to credit his professed freedom from violent and odious anti-Semitic sentiments and predilections." 56 Pa. D. & C. Rep. 328, 337 (R. 380a).

The court's attention is also called to the comments of Chief Justice Maxey in his dissenting opinion criticizing the action of the majority of the Supreme Court of Pennsylvania.

2. O'Donnell's admissions at the trial and the uncontradicted testimony of the petitioner's witnesses to whose credibility O'Donnell himself testified, established both the truth of the publication and probable cause for the petitioner's belief in its truthfulness, as well as a complete absence of malice or negligence on the part of petitioner. In such case, the Pennsylvania law of libel requires the court to enter judgment for the publisher.

O'Donnell's Admissions.

John O'Donnell admitted that in his conversation with Colonel Allen he told the latter that the Nazis had wiped out unemployment and put Germany back on her feet (R. 282a-283a). When confronted by Colonel Allen's testimony that O'Donnell had said in that conversation that the Nazis had done a good thing for Germany, O'Donnell would not deny having said so (R. 283a). O'Donnell also admitted that concerning the Nazi atrocities perpetrated upon Jews he answered, "There probably have been some excesses, but certain elements needed cleaning up in Germany" (R. 283a-285a).

O'Donnell further admitted that he had stated to Gardner Jackson that the Germans had done an effective and thorough job at reorganizing the country (R. 275a-278a). O'Donnell testified also that he had told Kenneth Crawford that the Nazis were treating the Jews just as they built roads, straight to the point, sweeping aside anything which gets in their way (R. 281a).

After reviewing O'Donnell's admissions, 356 Pa. 307, at 330-333 (R. 403-406), Chief Justice Maxey, in his dissenting opinion, asked:

> ". . . under what theory of administering justice a jury can be permitted to make a finding of fact in favor of a plaintiff *which finding is contrary to what the plaintiff himself testified under oath?*" 356 Pa. 307, at 343 (R. 414).

Weight of Uncontradicted Testimony of Other Witnesses.

Defendant introduced the testimony of several witnesses, whose reliability O'Donnell himself admitted, to prove that the editorial was written and published upon reasonable and probable cause for believing its truth.

Ulric Bell told J. David Stern, one of the co-writers, of O'Donnell's anti-Semitic leanings and the reference to O'Donnell's anti-Semitic attitude in a book entitled, "Strategy of Terror" by Edmond Taylor (R. 141a-142a). Mr. Bell testified that he also told Colonel Robert S. Allen, the other co-author, that he had heard O'Donnell admire the way the Germans were carrying out their program (R. 146a).

Thomas L. McNamara testified that he had told Colonel Allen on one occasion that O'Donnell had just argued that Hitler was right in his treatment of Jews in order to build up Germany (R. 199a-200a).

Kenneth Crawford testified that when he himself objected to the Nazi treatment of minorities, O'Donnell justified the Nazi program by saying that the Nazis were bent on the highest degree of efficiency and that if a minority got in its way it was pushed aside. Crawford related this conversation to Colonel Allen (R. 221a-222a).

Colonel Robert S. Allen testified that on one occasion prior to his writing the editorial he had accused O'Donnell of "talking like a Nazi." O'Donnell replied, "Well, the Nazi have done a lot of good things in Germany. They cleaned up Germany, wiped out unemployment and they have restored the honor and standing of Germany as a nation in the world" (R. 235a). When O'Donnell said that religion had not been suppressed in Germany (R. 237a), Colonel Allen asked about the atrocities against the Jews. O'Donnell replied there probably had been some excesses, but that "certain elements needed cleaning up in Germany" (R. 238a).

The testimony of Gardner Jackson at the first trial, by agreement, was read into the record. O'Donnell had told

Jackson that so many Jews in Germany had become dominant in the professions and in finance, that the Nazis had no other recourse than to remove them from those positions (R. 176a). Jackson related these conversations to Colonel Robert S. Allen (R. 180a-181a).

For a further discussion of the testimony of the above named witnesses, see the dissenting opinion of Chief Justice Maxey, 356 Pa. 307, 324-330 (R. 399-403).

Ruling of the Pennsylvania Courts.

The majority of the Supreme Court of Pennsylvania, without discussing the evidence, refused to enter a judgment *non obstante veredicto* (notwithstanding the verdict) for the defendant, saying:

> "Defendant now contends that the plaintiff should not hold his verdict because he 'admittedly made statements to one of the authors of the publication which support and justify the statement alleged to be libelous'. We must reject that contention because it contradicts the verdict. It was the duty of the jury to find what the witnesses said and what they meant and whether the defense of privilege was made out." 356 Pa. 307, at 312 (R. 387).

Of course your petitioner's contention contradicts the verdict. That is precisely the purpose of a motion for judgment n. o. v. No verdict can stand unless it is supported by the evidence. In this case, however, there could not possibly have been any issue of fact as to what the plaintiff said or what the plaintiff meant. Those facts were indisputably established by plaintiff's admission.

It is conceded that where evidence consists of oral testimony, even though uncontradicted, it is generally a question for the jury to determine whether an issue has been met. But this principle is not applicable where a party plaintiff gives oral testimony admitting a fact which, if proved by the defendant, would constitute a defense. Here, although the force and effect of credibility of de-

fendant's witnesses were for the jury, the plaintiff cannot contend, in opposition to a motion for judgment n. o. v., that *his* credibility was for the jury. He is bound by his own testimony. So is the jury to the extent that it would prohibit a verdict in his favor.

Here there is no question as to what the plaintiff said because he admitted it. Likewise, there is no question as to what he meant. If he stated something he did not mean, he cannot be heard to complain that his auditor took him at his word. Therefore, once the plaintiff admitted what he said, it becomes a pure question of law for the court to decide whether what he said constituted probable cause for what the defendant said of him. It is our contention that the plaintiff's admissions reasonably supported the meaning attributed to them by the authors of the editorial and that it is the function of the Court, not the jury, so to declare. Hence, although the burden of proof as to the probable cause was on defendant, yet that burden was met as a matter of law by the highest type of proof, to wit, the testimony of the plaintiff given in his own case.

The present case is just as if the plaintiff had stated in his pleadings precisely what he stated on the witness stand. Hence, petitioner suggests that on this record it is not correct to say that its contention contradicts the verdict but rather that the verdict is in the teeth of the evidence. Defendant did not rely on the testimony of witnesses to prove O'Donnell's admissions. O'Donnell himself made them on the witness stand. This is an entirely separate question from whether the testimony of defendant's witnesses amounted to probable cause.

The majority clearly erred when it held that it was a question for the jury to find whether O'Donnell said the things he admitted having said and what he meant by them. This, in effect, is like permitting O'Donnell to say, "I said them but the jury doesn't have to find that I did, and even though I said them and do not even now assert that I did not mean them, the jury can find that I didn't mean them

and hence Colonel Allen did not have probable cause for taking me at my word."

It is petitioner's contention that these admissions, as a matter of law, afforded the probable cause for publishing the editorial. There remained no further question of fact. It was immaterial whether or not Colonel Allen repeated O'Donnell's statement to Stern. The knowledge and belief of Colonel Allen himself as co-author of the alleged libel was the knowledge and belief of the defendant corporation. The trial judge instructed the jury that the statements admittedly made by the plaintiff to Colonel Allen were in themselves sufficient to afford reasonable and probable cause for writing the editorial (R. 311a), *but left it to the jury to determine whether the plaintiff actually said what he admitted he said* (R. 303a).

The law in Pennsylvania, as elsewhere, holds a plaintiff to be bound by his admissions. *Black v. Philadelphia Rapid Transit Co.*, 239 Pa. 463 (1913); *Cox v. Wilkes-Barre Railway Corp.*, 340 Pa. 554 (1941).

The evidence in this case does not present any issue of fact which should have been submitted to a jury:

(1) There was no material dispute in the evidence as to *what the witnesses said;*

(2) There was no material ambiguity as to *what the witnesses meant;*

(3) There was no evidence of malice or negligence, nor was there any other legally sufficient reason which could have justified the jury in finding that your petitioner did not have reasonable and probable cause for believing the truth of the publication.

Under the Pennsylvania law, it is for the court and not the jury to decide whether or not a communication is privileged. *Briggs v. Garrett*, 111 Pa. 404 (1886); *Williams v. Kroger Grocery & Baking Co.*, 337 Pa. 17 (1940).

It is admittedly your petitioner's burden to give evidence concerning the information on which he relied for

probable cause, and such proof must be met by the plaintiff in rebuttal.

> *Conroy v. Pittsburgh Times,* 139 Pa. 334 (1891); *Williams v. Kroger Grocery & Baking Co.,* 337 Pa. 17 (1940).

See also Restatement of the Law of Torts, Sections 613, 618, 619.

Chief Justice Maxey has very tersely summarized the evidence as follows:

> "*Since all these remarks were reported to J. David Stern or to Colonel Allen, or to both of them, and since there is absolutely no dispute that these remarks were reported to Stern,* this furnishes proof that Stern *had reasonable and probable cause for making the statement he did make about O'Donnell's being a Naziphile and that he, O'Donnell, was in sympathy with Hitler's aims, including the suppression of labor unions and the liquidation of Jews.* Besides, Allen, one of the authors of the editorial in question, had heard O'Donnell making these pro-Nazi statements. *There was, therefore, no basis for any finding that the editorial in question was not published on reasonable and probable cause* and the verdict of the jury so contrary to what the evidence called for should not be allowed to stand." 56 Pa. 307, at 336 (R. 408-409).

Again, at pages 343-344 (R. 415), Chief Justice Maxey said:

> "When a jury, by its verdict finds that there was no reasonable and probable cause for characterizing such a pro-Nazi as O'Donnell by his testimony *admitted himself to be,* as 'being in sympathy with Hitler's liquidation of Jews', *the contradiction* between the *verdict in favor of the plaintiff* and the *plaintiff's own testimony* is so *unmistakable* that no court can, in justice, permit it to stand, and the judgment based upon it should be set aside."

Chief Justice Maxey said further:

"When in the trial of a case a fact which will defeat the plaintiff's claim clearly appears from the testimony of the plaintiff himself, or from the testimony of his witnesses, there remains no issue to be submitted to the jury and the court should declare the fact established as a matter of law." 356 Pa. 307, at 344 (R. 415), citing *Miller v. Gault*, 345 Pa. 474 (1942); *Witkowski v. Lehigh Valley Railroad Co.*, 338 Pa. 510 (1940).

The dissenting opinion would have entered judgment for the defendant, notwithstanding the verdict, for two reasons stated by the Chief Justice as follows:

"(1) The defendant's own admissions, under cross-examination leave no room for doubt that the plaintiff was in sympathy with all of Hitler's policies, including his liquidation of the Jews, and the court should have declared that under the plaintiff's own testimony he was not entitled to a verdict.

(2) The fact was undisputed that several journalists whose good repute for reliability plaintiff himself admitted had told the writers of the editorial, of the plaintiff's expressions of sympathy with Hitler's policies towards Jews . . .

"Even if what the journalists who testified in this case reported to the writer of the editorial about the plaintiff's expression of pro-Nazi, anti-Semitic sentiments had *not* been true, yet since it is not disputed that the writers of the editorial believed what had been told to them, it follows that the defendant had reasonable and probable cause for writing and publishing the editorial and the court should have so declared as a matter of law, since the responsibility of deciding whether or not the defendant had proved reasonable and probable cause for publishing the editorial was for the court, and not the jury, as this court in *Briggs v. Garrett*,

111 Pa. 404, and in numerous other cases held. See *Ingram v. Reed,* 5 Pa. Superior Ct. 550, *Com. v. DiSilvestro,* 31 Pa. Superior Ct. 537, 553; *Williams Printing Co. v. Saunders,* 73 S. E. 472, 477; *Morton v. Knipe,* 112 N. Y. S. 451; *Locke v. Bradstreet Co.,* 22 Fed. 771 Minn.). In *Lovell Co. v. Houghton,* 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363, the New York Court of Appeals in its opinion by Judge Parker said: 'Whether the subject matter to which the alleged libel relates, and the interest in it of defendants, are such as to render the publication privileged, and therefore prima facie excusable, is a question for the court . . . [and] where, as in this case, the facts upon which the claim of a privileged communication is sought to be established are uncontradicted, upon the court rests the duty of determining, as a matter of law, whether the communication be privileged or not.'" 356 Pa. 307, 344-345 (R. 415-416).

Chief Justice Maxey, speaking for himself and two other members of the court who joined in his dissent, concluded by saying:

"Under the Constitution, no individual and no newspaper corporation, is required to pay $8,000 or any other sum of money for exercising his right of free speech on a proper occasion, in a proper manner and from a proper motive, his or its statement being made on reasonable and probable cause . . .

"The editorial in question having clearly been privileged and the plaintiff not having proved any abuse of the privilege, judgment should be entered for the defendant non obstante veredicto." 356 Pa. 307, 346-348 (R. 417-418).

From the above analysis of the evidence and expression of the law, in which we have borrowed heavily from the perspicacious dissenting opinion of Chief Justice Maxey, it must be observed that your petitioner is not complaining about any extraordinary rule of law peculiar to

Pennsylvania. On the contrary, the objection is that the Supreme Court of Pennsylvania has erroneously and arbitrarily refused to apply the basic common law rules of evidence and civil procedure.

As Justice Black stated in *Bridges v. California, Times-Mirror Company v. Superior Court of California*, 314 U. S. 252, at 260:

> ". . . in deciding whether or not the sweeping constitutional mandate against any law 'abridging the freedom of speech or of the press' forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one."

Accordingly, your petitioner respectfully urges that this Court exercise its discretionary power to review the unwarranted action of a state court in abridging freedom of the press to the detriment of the public interest at a time of national crisis.

CONCLUSION.

In view of the foregoing petition, the Philadelphia Record Company prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Pennsylvania rendered by a divided court, reported in 356 Pa. 307 (R. 386), which affirmed a judgment of the Court of Common Pleas No. 4 (tried in No. 2) of Philadelphia County in favor of the plaintiff in an action of libel, reported in 56 Pa. D. & C. Rep. 328 (R. 374).

JEROME J. ROTHSCHILD,
LEMUEL B. SCHOFIELD,
THOMAS D. MCBRIDE,
LAURENCE H. ELDREDGE,
W. BRADLEY WARD,
Solicitors for
Philadelphia Record Company,
Petitioner.

INDEX

PAGE

I. Introduction 1

II. Action of Pennsylvania Supreme Court Not Abridgment of Freedom of Press 2

TABLE OF CASES

Worcester County Co. v. Riley, 302 U. S. 292 (1937) 1

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. INTRODUCTION.

The petition filed in this case is based upon the proposition that the Pennsylvania Supreme Court, in affirming a judgment in the sum of $8,000. in favor of respondent, entered upon a jury's verdict in a libel action, has been guilty of a serious breach of the constitutional guarantee of freedom of the press. According to petitioner, the offense committed by the highest appellate court of the Commonwealth of Pennsylvania lies in its arbitrary and erroneous application of common law rules of evidence and civil procedure.

Respondent does not deem it necessary to defend or justify the action of the Pennsylvania Supreme Court. The opinion of that Court speaks for itself. Rather than undertake a consideration of the many contentions advanced by petitioner, this brief will be addressed solely to the question whether this Court should take jurisdiction to review the evidence in a libel action, make its own independent determination of the facts contrary to the verdict of the jury, and supplant its judgment for that of the State court as to the weight and sufficiency of the evidence.

Respondent believes this question supplies its own answer. However, in the last analysis, petitioner's real complaint is merely that the Pennsylvania Supreme Court has erred in the application of rules of evidence and procedure. In reply to this, suffice it to point out that "the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error, * * * or require that pronouncements shall be consistent": *Worcester County Co. v. Riley*, 302 U. S. 292 (1937).

II. THE ACTION OF THE PENNSYLVANIA SUPREME COURT WAS NOT AN ABRIDGMENT OF FREEDOM OF THE PRESS.

Petitioner seeks to have this Court assume jurisdiction on the ground that the action of the Supreme Court in affirming the judgment for respondent in a libel case transgressed the constitutional guarantee of freedom of the press.

Stripped of non-essentials, petitioner's complaint is that the Pennsylvania Supreme Court "erroneously and arbitrarily refused to apply the basic common law rules of evidence and civil procedure", and that its affirmance of the judgment constituted an "unwarranted action of a State court in abridging freedom of the press" (Petition, page 45). In so contending, petitioner asks this Court to "review the evidence in order to reach its own determination of the facts and to apply the proper common law rules of libel" (Petition, page 36).

While it is possible to conceive of a case where a State court, in the application of the law of the state, has acted so arbitrarily and capriciously as to give rise to a constitutional question, certainly the instant case does not fall within such category. It is an ordinary libel action based upon an editorial published by petitioner wherein respondent, among other things, was depicted as a "Naziphile" and in sympathy "with liquidation of Jews." The damaging effect of this accusation is evident. It was published in the Philadelphia Record of April 18, 1941, at a time when the war in Europe had been in progress for a period of approximately eighteen months. Furthermore, the publication necessarily constituted a dire reflection upon respondent's reputation as a newspaper columnist in charge of the Washington office of the New York Daily News.

Under the law of Pennsylvania, petitioner, by way of defense, had the absolute right to plead *truth*. However,

petitioner avoided the entry of such a plea and limited itself to a plea of *privilege*. Petitioner sought to prove that the editorial was published upon a proper occasion with a proper motive and with reasonable and probable cause for belief in its truth. In support of this defense, petitioner introduced in evidence statements which respondent purportedly had made to other newspaper men in the course of casual conversations, which these men had relayed to J. David Stern, petitioner's President and Publisher. That respondent had conversed with these men was not denied. However, his version of what he had said differed materially from their testimony, and he denied that he had expressed sympathy with "liquidation of Jews." As a matter of fact, petitioner concedes that respondent "did not *in haec verba* admit that he sympathized with the 'liquidation of Jews'" (Petition, page 22). Consequently, there was presented a factual issue falling within the province of the jury for determination. The verdict of the jury resolved the facts in respondent's favor.

This case was tried on two different occasions. On the first, the jury found a verdict for respondent in the sum of $50,000. A new trial was granted. The second trial resulted in a verdict of $25,000. The trial court, on the ground that the verdict was excessive, ordered the grant of a new trial unless respondent filed a remittitur of all the verdict in excess of $8,000. This respondent did, and judgment was entered in his favor in the reduced amount. On appeal, the Pennsylvania Supreme Court affirmed, stating with respect to petitioner's contention that respondent's own admissions under cross-examination established privilege as a matter of law: "It was the duty of the jury to find what the witnesses said and what they meant and whether the defense of privilege was made out" (R. 387). This has none of the characteristics of arbitrary or capricious action. The jury is the fact-finding body, and the Pennsylvania Supreme Court very properly so ruled.

In reality, petitioner is urging this Court to superimpose its judgment upon that of the Pennsylvania Supreme Court

as to Pennsylvania rules of evidence and civil procedure; and, in addition, to invade the province of the jury in the determination of issues of fact. To say the least, this is a novel and unprecedented request. If granted, it would mean that this Court would be deluged with petitions for writs of certiorari in libel and slander cases.

In conclusion, respondent calls this Court's attention to petitioner's statement: "Were this court to review every case in which it is alleged that without due process of law a defendant has been deprived of property or liberty or in which he suffers a money judgment because of an alleged libel committed by him, it would indeed be harassed with a multitude of questions with which the United States Supreme Court should not be burdened and with respect to which the decisions of the state court of last appeal should be accepted as final" (Petition, pp. 19, 20). Respondent fails to see what there is in the instant case which makes this observation inapplicable.

Petitioner seeks to extricate itself by characterizing the case as follows: "Where, however, in a rare instant such as this, a punitive sanction, by way of a money judgment, is unjustly imposed by a state court upon the courageous performance by the press of a public duty in a time of national crisis when the peril of a premature declaration of war threatens the nation, it is submitted that there can be no doubt of the right and power of this court to assume jurisdiction" (Petition, page 20). Fortunately, under the law of this land, the right of an individual to protection from defamation does not contract and expand dependent upon the condition of world affairs. The press is not endowed with a public duty to defame individuals.

For the reasons above-discussed, the petition should be denied.

Respectfully submitted,

THOMAS E. COMBER, JR.,
JOHN D. M. HAMILTON,
Attorneys for Respondent-Appellee.